Supreme Court, U.S.
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No. 02-468

IN THE

Supreme Court of the United States

CITIZEN POWER, INC., AND
AMERICAN PUBLIC POWER ASSOCIATION
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI

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REPLY ARGUMENT

Respondent FERC claims that the Judgment below "is correct and does not conflict" with any prior decision of this Court or other appellate court. Brief at 5, 8. Actually, the Judgment directly conflicts with the Second Circuit's decision in *Hartford*[1] and with *Hartford*'s Supreme Court and D.C. Circuit progeny. The conflict is inescapable, and the *Hartford* lineage is correct.

Hartford affirmed a finding by the early Federal Power Commission — by the men who crafted the Federal Power Act — that interstate generators are jurisdictional facilities, making their private owners jurisdictional "public utilities." It further found that because interstate generators are jurisdictional, their disposition triggers FPA § 203.[2] This finding squarely contradicts the ruling here that such dispositions do not trigger § 203.

FERC has never acknowledged the conflict or explained its departure from the *Hartford* lineage. Despite other recent cases where FERC has continued to rely on *Hartford* and its generation holding when convenient,[3] in its order below

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[1] *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

[2] *Hartford*, 131 F.2d at 963 & n.20 (finding that interstate generators are jurisdictional facilities, and doing so in order to avoid leaving it "undecided whether ... the Commission has authority, with respect to petitioner's generating facilities, under § 203").

[3] *See* Petition at 5-8 (citing cases from the 1980s and 1990s in which FERC reaffirmed its jurisdiction over generation-only facilities).

FERC denied that *Hartford* exists.[4] On brief here (at 7), FERC claims that *Hartford's* § 201 holding "does not answer the question whether FERC's jurisdiction under Section 203 extends to the *disposition* of generation-only facilities." But in fact the Second Circuit specifically found that § 203 *is* triggered. Indeed, it was precisely § 203 that drove the Second Circuit majority, as it sought a § 201 construction that made sense in light of the entire statute, to clarify that sections 201 and 203 do reach those generators that are used for interstate wholesale sales.[5] The Second Circuit answered the very question FERC claims it didn't address.

The Second Circuit's answer is correct. By referring broadly to "the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof [exceeding $50,000]" the plain text of § 203 demands that it reach every kind of facility made jurisdictional by § 201(b). Those types include the subset of generation facilities that enable "the sale of electric energy at wholesale in interstate commerce" — a subset that was small in 1935, but now represents the lion's share. The "but" and "except" clauses of § 201(b)(1) do not place those facilities outside FERC's jurisdiction or outside § 203. As the FPA's 1935 Conference Report explained, the "except" clause was added to clarify that the Commission *does* have jurisdiction over generation

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[4] *See* Petition B-7, B-5 ("Not only does the statutory text support our interpretation [that "Section 203 does not apply to dispositions of only generation facilities"], but there is no precedent, legislative history, or case law which would support a contrary conclusion.").

[5] *Hartford* at 963 n.20.

facilities "to the extent *regulation thereof* is provided for" in succeeding FPA subsections.[6]

As Justice Scalia has pointed out (in concurrence), FPA § 205 is one statutory section that specifically provides for a form of agency authority over generation-related transactions by firms that own interstate generators. *Mississippi Power & Light Co. v. Mississippi ex. rel. Moore,* 487 U.S. 354, 383 (1988). It does so even though FPA § 205 contains no jurisdictional language. FPA § 203 is another such section. Each confers authority to regulate one form of economic transactions involving jurisdictional facilities, and both look to FPA § 201 to delineate which facilities are jurisdictional.

In the opening paragraph of its Argument (at 4), FERC concedes that Congress directed readers to § 201, not § 203, for the delineation of which facilities are jurisdictional and therefore trigger § 203. However, FERC then asserts (at 6) that the "except as specifically provided" clause of § 201(b) creates a "default rule" that requires the reader to return to § 203 and search for a specific reference to jurisdiction over generation — the very subject that FERC (at 4) concedes § 203 "does not specifically address," and handles by directing the reader back to § 201.

The suggested exercise of looking to § 203 (or perhaps cycling interminably between §§ 201 and 203) in search of a jurisdictional delineation is worse than absurd. It contradicts

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[6] Conference Report to Accompany S. 2796, H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (Aug. 23, 1935) (emphasis added), *reprinted at* 79 Cong. Rec. H14621 (Aug. 24, 1935). *See also Mississippi Industries v. FERC,* 808 F.2d 1525, 1543 (explaining legislative history of the except clause), *vacated in other part,* 822 F.2d 1104 (D.C. Cir. 1987).

this Court's holding in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525 (1945) ("*CL&P*") that the FPA should be construed by first determining which facilities "make their owner a 'public utility'" and then applying all of the FPA's specific regulatory provisions to such utilities, rather than by "exempting from specific regulatory provisions a company found to be a public utility." As this Court explained, the extent of the Act's regulatory authorities "depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions." *Id.* at 528.

Perhaps seeing the unacknowledged conflict with *Hartford*, FERC seeks to undermine *Hartford's* authority by asserting (at 7) that this Court "expressly *rejected* the Second Circuit's construction of Section 201(b)" in *CL&P*. But *CL&P* commended *Hartford's* finding that interstate generation is jurisdictional.[7] *CL&P* rejected only the "negatively worded confirmation" logic by which the D.C. Circuit, in that case, had mis-extended *Hartford* to the point of construing 201(b)(1) to reach local distribution — after *Hartford* had found that local distribution is non-jurisdictional, 131 F.2d at 962. *Hartford* (and *CL&P* in commending it) recognized that unlike local distribution, interstate generation is brought within FERC's jurisdiction

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[7] *CL&P* at 528 n.6 (approving *Hartford* for "recogniz[ing the] need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales, and therefore were within section 201(b)(1)").

by the opening clauses (the first 86 words) of § 201(b)(1).[8] The opening clauses' differential treatment of interstate generation and local distribution is pivotal. It is not erased by FERC's facile implication (at 8) that *CL&P*'s rejection of local distribution jurisdiction extends to generation merely because the remaining language of § 201(b)(1) refers to generation and local distribution within "the same sentence."

Hartford's § 201(b) holding that interstate generation is jurisdictional thus remained good law after *CP&L*. Indeed both FERC and the D.C. Circuit have so found, with this Court's blessing. In the post-*CP&L* case of *Mississippi Industries*, FERC itself relied on *Hartford's* generation jurisdiction holding, as the basis for holding that a generation-only entity is a FERC-jurisdictional public utility. *Middle South Energy, Inc.*, 32 F.E.R.C. ¶ 61,425, at 61,947-48 (1985). In affirming, the D.C. Circuit recognized that *CP&L* "accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales."[9] This Court then relied on the validity of FERC's generation jurisdiction in a related case, *Mississippi Power & Light Co.*, 487 U.S. at 374 & n.13.

By failing to square its ruling here with *Hartford* and the Mississippi cases, FERC has departed without explanation both from its own generation-jurisdiction position and from

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[8] *See* 131 F.2d at 961 (if § 201(b)(1) stopped after 86 words, "it would be obvious that the Commission has jurisdiction over generation facilities when used in connection with interstate wholesale sales").

[9] *Mississippi Industries v. FERC*, 808 F.2d at 1544.

the *stare decisis*[10] federal case law adopting that position. Nor has FERC reconciled its position with the statutory text, which would preclude *Chevron*[11] deference even if this were a matter of first impression. Instead, FERC (at 5) falls back on unintelligible assertions regarding "bifurcation" and "nexus."

Construing the vague "bifurcation" found by the D.C. Circuit below, FERC (at 5) sees a divide "between regulation of facilities for the 'transmission or [wholesale] sale of electric energy' in interstate commerce, and regulation of 'facilities used for the generation of electric energy.'" But it is indisputable and judicially-established that the generators required to produce power for wholesale sales are facilities for wholesale sales.[12] Interstate generators therefore appear on both sides of the asserted "bifurcation."

As to "nexus," FERC suggests (at 5 n.2) that it may regulate a generator disposition only if the disposition has a "necessary nexus" to a wholesale sale. Similarly, FERC asserts (at 8) that FERC's rate setting authority under §§ 205-206 "does not in itself establish federal jurisdiction over the disposition of generation-only facilities." But Congress authorized FERC to apply all of its regulatory authorities, § 203 included, to utilities that own or control jurisdictional facilities. *CP&L*, 324 U.S. at 525. Section 203 jurisdiction does not turn on Section 205; it turns on Section 201. *See CP&L* at 525. *See also* Petition at 23-24.

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[10] *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[11] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

[12] *See, e.g., Mississippi Industries v. FERC*, 808 F.2d at 1543-45.

CONCLUSION

Congress enacted § 203 to protect against uneconomic consolidations at the heart of the nation's industrial economy. Whether FERC will respect that Congressional enactment now depends on this Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

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